

Dep't of Correction v. Royster

OATH Index Nos. 156/20, 157/20, 460/20 (June 26, 2020), *adopted in part, rejected in part*, Comm'r Dec. (Sept. 8, 2020), **appended**, *aff'd*, NYC Civ. Serv. Comm'n Case Nos. 2020-0643, 2020-0644, & 2020-0645 (July 9, 2021), **appended**

Correction officers wrote incomplete and inaccurate use of force reports when they omitted a captain's retaliatory use of force against an inmate. 15-day suspension recommended for each officer.

Commissioner imposed a 30-day suspension, finding the recommended 15-day suspension to be insufficient to deter this kind of misconduct. Commissioner rejected the ALJ's ruling that OATH is not bound by Nunez penalty guidelines, citing to the opinion of the Corporation Counsel, *appended*, that the OATH ALJ must explain any departure from the Nunez penalties guidelines.

NYC Civil Service Commission affirmed the 30-day suspensions imposed by the DOC Commissioner.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
-against-
**KIM ROYSTER, JOVENY MOMPREMIER,
AND JOEL ANDREWS**
Respondents

REPORT AND RECOMMENDATION

ASTRID B. GLOADE, *Administrative Law Judge*

This employee disciplinary proceeding was referred by petitioner, the Department of Correction ("Department") under section 75 of the Civil Service Law. Petitioner alleges that Correction Officers Kim Royster, Joveny Mompremier, and Joel Andrews submitted false or misleading use of force reports when they omitted from their reports that a captain took retaliatory action against an inmate (ALJ Exs. 1-3).

During a two-day trial, the Department called one witness and offered documentary, audio, and video evidence. Respondents testified and offered documentary evidence. For the reasons

below, I find that the charges are sustained and recommend that Officers Royster, Mompremier, and Andrews each be suspended without pay for 15 days.

ANALYSIS

The incident giving rise to these charges occurred on May 8, 2018, at approximately 1:30 p.m. in a vestibule outside the control room in a housing area of the Anna M. Kross Center (“AMKC”). Petitioner alleges that respondents witnessed a captain use unnecessary and excessive force against an inmate by repeatedly striking and stabbing him with a pen when he was attempting to surrender, and failed to include that use of force in their written reports. (ALJ Exs. 1-3).

The events preceding the incident are largely undisputed. In an interview conducted by Investigator Flores of the Department’s Use of Force Enforcement Team one day after the incident, the inmate stated that the captain and he had a negative encounter shortly before he entered his housing unit. While the captain was directing inmate movement in a corridor of the facility, she tapped the inmate on his shoulder. The inmate removed the captain’s hand and told her not to touch him, which caused the captain to become angry. The inmate threw a folded piece of paper at the captain, hitting her in the face. A few minutes later, the captain went into the inmate’s housing area, where Officer Royster was on duty as the A post officer, summoned the inmate, and began to talk to him (Tr. 24-26, 128; Pet. Exs. 1, 7).

Officer Royster has been employed as a correction officer for nearly 13 years and has been assigned to AMKC since the beginning of her tenure. On May 8, 2018, before the encounter between the captain and the inmate, she was assigned to the command room, where she received a call from the main clinic stating the inmate was “acting up.” When the inmate came to the housing area, Officer Royster gave him his lunch (Tr. 127-29).

Officer Royster testified that she was in the A station area when the captain, with whom she was familiar but did not have a personal relationship, instructed her to call the inmate (Tr. 137). When the inmate arrived, he and the captain began talking about an incident that had taken place earlier in the day. The interaction between the captain and the inmate escalated when the inmate told the captain not to touch him (Tr. 133). Officer Royster maintained that the captain remained calm and told the inmate that she was not going to touch him, but was there to help him (Tr. 130). The inmate and the captain continued to talk for several minutes. Suddenly, the inmate struck the captain in the face, causing her to bleed. Officer Royster went towards the inmate and tried to stop

his assault on the captain (Tr. 131, 144).

The inmate continued to strike the captain and also struck Officer Royster, knocking her to the ground. Officer Royster got up and dispersed the chemical agent oleoresin capsicum (“O.C.”). When the inmate continued to strike the captain, Officer Royster went into the A station to try to get help from the officer assigned to the B post, but the captain’s arm became stuck in the B gate. As the inmate continued to attack the captain while her arm was stuck in the gate, Officer Royster sprayed him again with O.C. (Tr. 130-31).

Despite being sprayed a second time, the inmate continued to assault the captain. Eventually, the inmate seemed to grow tired and “[e]verything stopped” (Tr. 132). The inmate then went into a bathroom in the A station area and the captain called for a probe team (Tr. 146). While the inmate was in the bathroom, Officer Royster waited for the probe team to respond to the scene, which they did around the time the inmate was stepping out of the bathroom (Tr. 132, 148). When the probe team arrived, Officer Royster used keys to open the door and let them into the area (Tr. 148).

Officer Royster testified she saw the inmate open the bathroom door and the captain walk towards the inmate (Tr. 134). The captain appeared angry as she walked towards the inmate and Officer Royster assumed that the captain was going after the inmate. However, Officer Royster testified that she was unsure if the captain was going to retaliate against the inmate and that she did not see the captain holding an object in her hand (Tr. 151-52). As the captain walked towards the inmate, a second response team rang the bell seeking access to the A station and Officer Royster, who was facing the bathroom, turned away to open the door for them. She insisted that she was facing away from the captain, the inmate, and the officers from the first response team and was unable to see what occurred while they were in the doorway of the bathroom (Tr. 134).

According to Officer Royster, her vision was impaired because her prescription glasses were knocked off during the incident and her vision was blurry (Tr. 133, 153). She contends that her vision was further affected by O.C., which caused her eyes to burn, and that she was “discombobulated” after being struck in the face (Tr. 134). As a result, Officer Royster testified, although she saw the captain in the bathroom she was unable to see exactly what the captain was doing there. However, she saw Officer Mompremier pull the captain back to keep her from advancing towards the inmate (Tr. 160-61, 167).

Officer Royster was taken to the hospital following the incident and did not report back to her command until approximately 11:00 p.m. that night, at which time she filed a report documenting the incident (Tr. 135; Pet. Ex. 3). In her report, Officer Royster described the inmate's attack and in a section that required her to describe the incident and the specific force used, she wrote:

This writer then assisted [the captain] by giving the said [inmate] multiple upper body strikes with a closed fist, after noticing blood gushing from [the captain's] head in being in fear of her life for being in imminent danger. [The inmate] then turn around to this writer and punch me in my facial area with a closed fist, causing me to fall backwards and land on my arms. This writer quickly got up and deployed two (2) two (2) second bursts of chemical agents towards [the inmate's] facial area. [The inmate] then ran inside the staff bathroom to wash his face and came back out of the staff bathroom. By this time a probe team arrive on post and put flex cuffs on [the inmate] and escorted him out of the housing area without this writer using any more force.

(Pet. Ex. 3). Officer Royster concedes her report omitted that she witnessed the captain advancing towards the bathroom and the response team's efforts to restrain the captain, but maintains that she was not required to include these details in her report because she did not see the captain use force against the inmate (Tr. 172-74; Pet. Ex. 3).

Officer Andrews was assigned to one of the teams that responded to the incident (Tr. 183-84). Because he was not wearing a mask when he entered the area, he immediately felt the effects of the O.C. that Officer Royster sprayed and began to cough, choke, and sneeze (Tr. 184). He stepped out of the vestibule area to compose himself after his exposure to the O.C. and when he re-entered the area, he saw the captain covered in blood. Officer Andrews' immediate thought was to get the captain medical attention (Tr. 184-86, 197). He also saw an inmate exiting a bathroom, but did not know that the inmate had been involved in the assault (Tr. 185).

Officer Andrews testified that as he approached the captain to remove her from the area, she headed towards the bathroom where the inmate was located. However, he said that he did not "see her directly in the bathroom" (Tr. 186). Officer Andrews was facing in the direction of the bathroom when the captain went into the bathroom. He went towards the bathroom and was partially inside the room with his hands on the captain, who was in the bathroom along with the inmate and Officer Mompremier (Tr. 204-06). Officer Andrews and another officer removed the

captain from the bathroom and he assisted Officer Mompremier in securing the inmate (Tr. 187-88, 198).

Although Officer Andrews was partially inside the small bathroom that contained only a sink, shelf, and toilet, he maintained that he did not see what happened between the inmate and the captain while they were in that room (Tr. 39-42, 188, 206, 258; Pet. Ex. 8). He testified that he did not see the captain raise her hands while she was in the bathroom (Tr. 186, 212). He suggested that his view of the incident was obstructed because at five feet, four inches tall, he was the shortest person in the bathroom (Tr. 225-26).

In his report, written the day of the incident, Officer Andrews reported that the force used in the incident consisted of his efforts to secure the inmate (Tr. 187; Pet. Ex. 4). His report includes details of his interaction with the inmate, but omits any reference to the captain's actions. Specifically, after detailing the date, time, location, and nature of the incident to which his team was assigned, Officer Andrews wrote:

Upon arriving to the housing area, this writer gave [the inmate] several direct orders to put his hand behind his back and stop resisting. This writer then placed mechanical restraints on said inmate. This writer then escorted said inmate out of the housing area. The institutional team arrived to the area and took possession of [the inmate] without further incident.

(Pet. Ex. 4). Officer Andrews insisted that it was unnecessary to include the events in the bathroom in his report because he did not see anyone take action against the inmate (Tr. 228).

Officer Mompremier was also part of the team that responded to the alarm in the housing area on May 8, 2018 (Tr. 232). In preparing to respond, Officer Mompremier saw another team member put on a gas mask and did the same. Officer Mompremier testified that while the mask allows the wearer to breathe without feeling the effects of O.C., it limits peripheral vision so that the wearer can only see what is in front of him (Tr. 234-35).

On entering the vestibule area, Officer Mompremier saw the captain with blood all over her shirt. Because of the captain's condition, he initially tried to escort her out of the area (Tr. 235). However, his attention was diverted when the door of the staff bathroom opened and he turned to see a shirtless inmate with raised hands in the doorway (Tr. 235-36). As he had been trained to secure all inmates when responding to an alarm, Officer Mompremier went towards the inmate (Tr. 236-37, 265).

Officer Mompremier was approaching the bathroom when he felt someone coming up on his right side. He testified that he did not know who was at his side because the mask he was wearing obscured his vision, but he put his arm around the person as he tried to get to the inmate. Because the inmate had his hands raised when the door opened, Officer Mompremier assumed the inmate wanted to surrender. He ordered the inmate to get down to the floor and it appeared that the inmate was complying, but as he approached the bathroom, the inmate began to get back up. When Officer Mompremier entered the bathroom another person, who he realized was the captain, entered as well (Tr. 236).

According to Officer Mompremier, based on what he saw in the bathroom, the captain was the aggressor because she attempted to strike the inmate, who did not try to hit her (Tr. 259-60, 265). Officer Mompremier saw the captain raise her hand to strike the inmate two or three times, but maintained that she did not actually hit the inmate because he and the inmate were able to prevent the captain from doing so (Tr. 236-37, 257-58). Specifically, Officer Mompremier testified that “there was no assault” by the captain and she “did not make contact with [the inmate]” while they were in the bathroom (Tr. 237, 258).

Officer Mompremier removed the inmate from the bathroom and brought him down to the ground. Officer Andrews then came to his aid and they secured the inmate as Department staff removed the captain from the area (Tr. 236-37).

Officer Mompremier acknowledged that he is required to prevent a use of force against an inmate and to report when he witnesses a use of force against an inmate (Tr. 238-39). He testified that he wrote a use of force report because he employed force when he brought the inmate down to the ground, not because of what he witnessed in the bathroom (Tr. 261, 263). In his report, Officer Mompremier included details about his response to the alarm, that he put on a mask, and that another captain, who he identified, and Officer Andrews were involved (Tr. 261-62; Pet. Ex. 5). Officer Mompremier reported that:

Upon arriving to the area, this writer smelled OC in the air. This writer proceeded to [don] his mask, and enter the affected area. This writer proceeded to give [the inmate] direct orders to lay down on the ground. Said inmate refused stating “you got to hear me out first”. This writer then gave a final order in which he refused, stating “hold on, hear me out!” At which point, this writer guided [the inmate] to the ground and along with the assistance of CO Andrews #5235, secured [the inmate] in mechanical restraints. This writer along with CO Andrews #5235 secured [the inmate]

until the probe team secured the housing area, at which time the inmate was handed over to the probe team without any further incident.

(Pet. Ex. 5). Omitted from Officer Mompremier's report was that he tried to restrain the captain as she went towards the inmate who was in the bathroom, that he was in the bathroom with the captain and the inmate when the captain repeatedly struck at the inmate, or that he and the inmate tried to stop the captain from striking the inmate (Tr. 264, 272; Pet. Ex. 5).

Video cameras in the vestibule outside the control room, which did not record sound, capture the inmate's assault on the captain and Officer Royster and the Department staff's response to the incident, including the altercation between the captain and the inmate in the bathroom (Pet. Ex. 6).

The video captures the incident from multiple camera angles. Camera 88.249 shows Officer Royster opening the door to the vestibule for the inmate to enter and providing him with lunch. The inmate proceeds through a gate to the housing area (Pet. Ex. 6 at 13:22:40-13:23:15). Moments later, the captain enters the vestibule (Pet. Ex. 6 at 13:25:14). The inmate is then brought into the vestibule and talks to the captain while Officer Royster stands nearby. As the inmate puts his head down and faces away from the captain, she moves closer to him as he steps back and their conversation continues (Pet. Ex. 6 at 13:25:31-13:27:16).

Suddenly, the inmate strikes the captain in the face with his fist. Officer Royster attempts to pull him away from the captain and a brawl between the captain, Officer Royster, and the inmate ensues. The inmate repeatedly strikes the captain and Officer Royster and throws them to the ground. Officer Royster pulls out her chemical agent and sprays the inmate (Pet. Ex. 6 at 13:27:47-13:28:05). Officer Royster retreats into the control room, while the fight between the captain, whose face and shirt are covered in blood, and the inmate continues. Officer Royster comes out of the control room and deploys her O.C. towards the inmate again (Pet. Ex. 6 at 13:28:23). The captain's arm becomes stuck in a gate in the vestibule, and the inmate strikes her repeatedly. The captain and Officer Royster are able to retreat into the control room, leaving the inmate in the vestibule (Pet. Ex. 6 at 13:28:26-13:28:37).

Officer Royster and the captain leave the control room and approach the inmate as he tries

to enter the housing area and is pushed back by other inmates (Pet. Ex. 6 at 13:28:41). The inmate runs away from them as they head back into the control room. He leans over a garbage can for several seconds, wipes his eyes, then runs out of the frame. The captain and Officer Royster exit the control room and Officer Royster opens the door to the unit (Pet. Ex. 6 at 13:28:43-13:29:26).

Camera 88.248 shows the inmate entering into a bathroom in the vestibule and the captain attempting to open the door to that room. The captain then reaches down to the floor and picks up an object that appears to be a pen (Pet. Ex. 6 at 13:29:00-13:29:30; Pet. Ex. 10 at 15). The first response team arrives and Officer Royster opens the door for the team to enter the vestibule. Officer Andrews, who is not wearing a gas mask, is the first to enter. He holds his hand over his mouth and nose and, after briefly talking to the captain, steps out of the vestibule. Officer Mompremier, who is wearing a gas mask, enters the area with the team (Pet. Ex. 6, at 13:29:36-13:29:78).

Officer Mompremier guides the captain away from the bathroom door, with his hand near her lower back as they walk away from the closed bathroom door. The inmate opens the bathroom door and crouches down towards the floor with his hands stretching out in front of him as he attempts to go down to the ground. The inmate appears to be trying to surrender and is not resisting. The captain turns around and quickly walks past Officer Mompremier towards the bathroom. Using his hands, Officer Mompremier attempts to stop the captain, but is unsuccessful. The inmate gets up from his crouching position and stands up as the captain and Officer Mompremier approach the bathroom. Officer Royster, who had been in the control room, pokes her head out, then exits the room and follows them towards the bathroom. Officer Mompremier faces the bathroom, his right hand under the captain's left arm as she enters the bathroom. The captain, Officer Mompremier, and the inmate end up in the bathroom, with Officer Royster a few feet away just outside the bathroom facing the bathroom (Pet. Ex. 6, Cameras 88.248 and 88.249 at 13:29:48-13:30:10).

Inside the bathroom, the captain raises her arm several times and makes stabbing motions towards the inmate, whose back is initially against a wall. Because Officer Mompremier is partially blocked by a wall, it is difficult to clearly see his actions in the bathroom. However, the video shows an object that looks like a pen in the captain's raised right hand as she faces the inmate and a hand grabbing the captain's hand as she brings her arm down toward the inmate. Officer

Royster stands behind the captain, followed by a third officer (Pet. Ex. 6, Camera 88.248 at 13:30:11-13:30:14).

Officer Andrews enters into the frame and rushes into the bathroom behind the captain and Officer Royster so that most of his body is inside the bathroom with the captain as she strikes at the inmate, and Officer Mompremier (Pet. Ex. 6, Camera 88.248 at 13:30:14). Officer Royster, who had been standing just outside the bathroom with her face towards the activity in the bathroom, turns her head away as Officer Andrews enters the bathroom and walks away. Officer Andrews and another officer pull the captain out of the bathroom (Pet. Ex. 6, Camera 88.248 at 13:30:10-13:30:16). Officer Mompremier then brings the inmate out of the bathroom, and guides him to the ground, where he places the inmate in hand restraints with the assistance of Officer Andrews and another captain. They then remove the inmate from the area (Pet. Ex. 6, Camera 88.248 at 13:30:25-13:30:56).

Investigator Flores interviewed the inmate who attacked the captain about 24 hours after the incident (Pet. Ex. 7). The inmate claimed that he had been summoned to the vestibule area, where he got into an argument with the captain who threatened to knock him out and shouted profanities at him. He said he became scared and that he punched the captain because he felt threatened (Pet. Ex. 7). According to the inmate, after the physical altercation with the captain and Officer Royster, he went into the bathroom to wash off the O.C., which is when the captain tried to stab him with a pen. He maintained he still had the pen marks on his hand from where the captain struck him. Investigator Flores took photographs of two ink marks on the inmate's right hand during the interview, one of which appeared to be smudged. She did not consider the marks on the inmate to be stab wounds, as his skin was not punctured (Tr. 24, 50, 56, 85-87; Pet. Exs. 7, 9).

Officer Mompremier testified that he was not required to report the captain's actions as a use of force because he and the inmate thwarted her efforts to strike the inmate so that she did not make contact with the inmate. Therefore, his counsel argued, the incident involved an attempted use of force by the captain, which the officer was not required to report (Tr. 15, 291-92). This argument is unavailing.

The Department's Use of Force Directive 5006R-D, effective September 27, 2017 (the "Directive"), reflects a zero tolerance for excessive and unnecessary force and requires that staff

members use the minimum amount of proportional force required to stop or control threats. Directive 5006R-D § II(C), (D). The Directive defines “use of force” as:

. . . any instance where Staff use their hands or other parts of their body, objects, instruments, chemical agents, electronic devices, firearms, or any other physical method to restrain, subdue, or compel an Inmate to act or stop acting in a particular way. The term “Use of Force” does not include moving, escorting, transporting, or applying restraints to a compliant Inmate.

Directive 5006R-D § III. The Directive prohibits staff from using force to “punish, discipline, assault, or retaliate against an Inmate” and requires that staff members who engage in or witness use of force report the incident to their immediate supervisors. *Id.* §§ V(B)(1)(a), VI(5)(a)(i).

This definition of “use of force” encompasses the captain’s actions, which consist of using a pen to strike at an inmate. The definition does not require that there be contact with the inmate: it encompasses employing a physical method to restrain, subdue, or compel an inmate to act or refrain from acting. Here, the captain exercised force when she raised her arm and brought down her hand, which held a pen, to strike the inmate who had just assaulted her. This constitutes a use of force. Respondents’ interpretation of the Directive is inconsistent with the language of the Directive and with common sense. To adopt respondents’ interpretation would mean, for example, that an officer who sees a colleague repeatedly try to hit an inmate with a fist, chair, or baton would not be required to report the incident as a use of force because the attacking officer missed the target. This would be an absurd result, contrary to the policies underlying the Directive. Accordingly, respondents’ argument fails.

Even if respondents’ interpretation of the Directive was correct, however, the credible evidence establishes that the captain made contact with the inmate when she struck at him with the pen. The video shows the captain taking a pen and repeatedly striking at the inmate in the confines of a small bathroom. Officer Mompremier was in the bathroom with them and witnessed the events unfold. His testimony that the captain struck at but did not make contact with the inmate is not believable. Officer Mompremier conceded that he was not able to deflect all of the captain’s blows and the inmate also stopped the captain’s blows. Thus, the captain made contact with the inmate when he deflected her blows. Moreover, the credible evidence shows that the captain struck the inmate with the pen, including the photographs which Investigator Flores took of the ink marks

on the inmate's hand a day after the incident, which the inmate attributed to the captain having tried to stab him with a pen (Pet. Exs. 7, 9). It more likely than not that the pen the captain wielded as she attacked the inmate made contact with his hand, leaving small pen marks, but did not pierce his skin. The captain's actions constitute a use of force under the Directive, regardless of the level of harm to the inmate. In sum, the evidence establishes that the captain used force when she struck the inmate with a pen.

The Directive requires that each staff member who employs or witnesses a use of force prepare a written report concerning the incident "based on their own observations and personal knowledge" Directive 5006R-D § VI(5)(b)(i). The report must include a list of all persons who participated in or witnessed the event, "or whom the writer observed present at the incident and their actions," as well as a "detailed description" of the incident and "the events preceding the Use of Force Incident." *Id.* § VI(5)(c)(iii)(E), (G). Respondents' reports were inaccurate because they failed to include information that they were required to report.

To establish that respondents provided incomplete and inaccurate accounts of the use of force incident in their written reports, petitioner must establish, by a preponderance of the credible evidence, "that the underlying incident occurred and that respondents' statements materially deviated from the actual events." *Dep't of Correction v. Dominguez, Hernandez, and Christie*, OATH Index Nos. 615/19, 731/19, and 770/19 at 16 (May 21, 2019), *aff'd*, NYC Civ. Serv. Comm'n Case Nos. 2019-0824, 2019-0825 (Feb. 5, 2020) (report that omitted altercation, but included events leading up to it and after it was misleading); *Dep't of Correction v. Rothwell*, OATH Index No. 1963/17 at 11 (Nov. 3, 2017), *modified*, Comm'r Dec. (Jan. 8, 2018) (misconduct proved where captain failed to state in her use of force report and MEO 16 interview that she struck an inmate); *Dep't of Correction v. Hall*, OATH Index No. 400/08 at 2 (Oct. 18, 2007), *aff'd*, Civ. Serv. Comm'n Item No. CD 08-33-SA (May 30, 2008). Petitioner has met its burden of proving the charged misconduct.

Officer Royster credibly testified that her vision was impaired by the O.C. spray, being struck in the facial area, and the loss of her prescription glasses in the attack. Even so, she was less than persuasive in her contention that she did not see the captain's actions in the bathroom (Tr. 134). The evidence establishes that Officer Royster was standing close to and facing the bathroom as the captain attacked the inmate. She presented no evidence that the O.C. and her lack of glasses

prevented her from seeing events that occurred only a few feet in front of her. In addition to being close to the entrance of the bathroom, Officer Royster did not turn away until after the captain had struck at the inmate several times, making it difficult to believe that she did not see what transpired in the bathroom. As for Officer Royster's claim that she could not see because she was 'discombobulated' after being struck by the inmate, it is notable that after losing her glasses she was able to use keys to open the door and let the response team into the area. In addition, Officer Royster admitted that she saw the captain advancing to the bathroom where the inmate was hiding after the brutal assault and saw an officer pull the captain back, which was not included in her report. This suggests that her vision and abilities were sufficiently intact that she was able to see what was occurring around her, including the captain's actions in the bathroom. Her report reflects a wholesale omission of the aspects of the incident that would have exposed the captain to discipline for attacking the inmate in retaliation for his assault on them.

As for Officer Andrews, he writes in his use of force report that he arrived in the housing area and goes on to indicate that he placed the inmate in handcuffs, with no mention of the captain going into the bathroom or her actions once there (Tr. 217-19; Pet. Ex. 4). Officer Andrews claims that he did not see the captain's actions when she was in the bathroom because he was suffering from the effects of the O.C. and also because his line of sight was blocked by others. This is not believable. As Officer Andrews conceded, he was facing the bathroom when the captain charged towards the inmate. Moreover, he was partially in the bathroom, which was a small space, and very close to the captain when she struck at the inmate, making it difficult to believe that he did not see her actions.

Further, in the section of the report that asks the reporting officer if any other uniformed or non-uniformed staff were present at the time of the incident, Officer Andrews did not include the captain (Tr. 219-20; Pet. Ex. 4). Officer Andrews received training in writing use of force reports (Tr. 189) and should have known that the Directive requires him to list all persons who participated in or witnessed the event, or whom he "observed present at the incident and their actions." Directive §§ VI(5)(c)(iii)(E), (G). His explanation that the use of force form only had space for three names (Tr. 220) is disingenuous, because he could have simply added the names on a separate sheet of paper. Furthermore, Officer Andrews knew that the inmate had caused the captain's injuries before he wrote his report (Tr. 222), making it likely that her conduct was retaliatory.

Therefore, his failure to include the captain's actions is all the more inexplicable as the Directive expressly prohibits force used to retaliate against an inmate. Given the captain's central role in the incident, the most reasonable explanation for Officer Andrews' failure to report her actions in his report is that he was trying to insulate her from the repercussions of her retaliatory attack on the inmate.

Similarly, Officer Mompremier's written report omitted material details of the use of force incident. As the situation was unfolding, Officer Mompremier appears to have acted appropriately when he quickly subdued the only inmate in the vicinity after seeing the bloodied captain. When the captain suddenly approached the bathroom where the inmate was located and, armed with a pen, tried to stab the inmate, Officer Mompremier grabbed the captain's hand to prevent serious injury to the inmate, whom he handcuffed after the incident. The problem is that Officer Mompremier omitted significant, material details about the captain's actions from his report. Officer Mompremier's contention that he did not have to report the captain's attempt to stab the inmate is unavailing, as already discussed.

Officer Mompremier admitted that he was in the bathroom and saw the captain raise her arm to strike the inmate with a pen, but insisted that he was not required to report her actions because he and the inmate were able to prevent the use of force. Officer Mompremier is incorrect. The captain used force by raising her arm and bringing it down to strike the inmate with a pen and Officer Mompremier was required to report her conduct, even if he believed that she did not make contact with the inmate.

Moreover, Officer Mompremier's contention that he wrote the report because of his own use of force, not because of the captain's conduct, is no excuse. The Directive requires that he report all others who were present at the use of force incident and their actions: this would certainly include the captain's attack on the inmate. By failing to describe the captain's actions while in the bathroom, Officer Mompremier failed to comply with the Directive. *See Dep't of Correction v. Johnson*, OATH Index No. 1639/05 at 9-10 (Aug. 18, 2005), *modified on penalty*, Comm'r Dec. (Oct. 27, 2005), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 07-29-M (Mar. 14, 2007) (report that omitted events leading to the use of force was misleading).

In sum, petitioner established that Officers Royster, Andrews, and Mompremier filed incomplete and inaccurate use of force reports.

FINDINGS AND CONCLUSIONS

1. Petitioner established that Officer Royster filed an incomplete and inaccurate use of force report because she observed a captain strike and attempt to stab an inmate and failed to include the captain's actions in her report, in violation of the Department's Use of Force Directive.
2. Petitioner established that Officer Andrews filed an incomplete and inaccurate use of force report because he observed a captain strike and attempt to stab an inmate and failed to include her actions in his report, in violation of the Department's Use of Force Directive.
3. Petitioner established Officer Mompremier filed an incomplete and inaccurate use of force report because he observed a captain strike and attempt to stab an inmate with a pen and failed to include her use of force in his report, in violation of the Department's Use of Force Directive.

RECOMMENDATION

Upon making the above findings and conclusions, I obtained and reviewed the abstract of the employee performance service reports (Form 22R) of Officers Royster, Andrews, and Mompremier for the purposes of recommending an appropriate penalty. Officer Royster was appointed as a correction officer in March 2007, Officer Andrews was appointed in October 2014, and Officer Mompremier was appointed in August 2015. None of the officers have been previously disciplined.

The Department seeks a 30-day suspension for each officer, contending that they deliberately falsified their reports of what occurred during the incident (Tr. 299-300). That penalty is excessive.

Penalties for officers who submit false or misleading reports have ranged from 10 to 45 days' suspension, considering factors that include the officer's disciplinary history, the severity of the force and injury, and the degree of the officer's involvement in any deception relating to the use of force incident. *See Dep't of Correction v. Hamil*, OATH Index Nos. 1213/18 & 1215/18 (July 9, 2018), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2018-1174 (Mar. 14, 2019), (15-day suspension upheld by Civil Service Commission for officer with no disciplinary record who made false or misleading statements in a use of force report; 45-day penalty upheld for second officer who had a significant disciplinary history); *Dep't of Correction v. Cantelmo*, OATH Index No.

2562/17 at 5 (Oct. 12, 2017) *aff'd*, NYC Civ. Serv. Comm'n Case No. 2018-0135 (July 23, 2018) (correction officer who filed a false use of force report and made a false statement in a MEO 16 interview received a 15-day suspension for each instance of false reporting); *Dep't of Correction v. Ford*, OATH Index No. 734/13 at 29-30 (May 23, 2013) *aff'd*, NYC Civ. Serv. Comm'n Dec. No. 35686 (Feb. 27, 2015) (15-day suspensions for two officers with unblemished disciplinary records who submitted false and misleading use of force reports); *Dep't of Correction v. Dyce*, OATH Index Nos. 1456/08, 1459/08 & 1542/08 at 9-10 (June 17, 2008), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 09-23-M (Apr. 6, 2009) (Civil Service Commission reduced penalty for long-term officer with no prior record to 10 days' suspension for omitting material details from use of force report and MEO 16 interview).

As justification for the 30-day penalty petitioner seeks for each officer, counsel for the Department relied on its Disciplinary Guidelines for Use of Force Incidents ("Guidelines"), contending they "call for a 30-day suspension in each case" (Tr. 299). The Guidelines, however, are just that: they reflect "proposed progressive penalty ranges the Department will seek for certain use-of-force related misconduct through the disciplinary process" and provide for deviation from the Guideline's penalties based on factors that include the nature of the misconduct and mitigating and/or aggravating factors, (Guidelines at 1). Thus, the Guidelines themselves permit discretion and implicitly acknowledge that although the Department may "seek" penalties as set forth in the Guidelines, this tribunal is not required to impose them. Indeed, the Department's Guidelines are not binding on OATH, which is an independent tribunal that is not under the Department's control. *See Dep't of Correction v. Victor*, OATH Index No. 388/15, mem. dec. (Feb. 3, 2015), *aff'd*, Index No. 100890/15 (Sup. Ct. N.Y. Co. May 29, 2018) (Hagler, JSC) (finding that OATH is an independent tribunal under the City Charter and is not under the Department's control); *Dep't of Correction v. Johnson*, OATH Index No. 1663/19, mem. dec. at 5 (Sept. 12, 2019) ("One of the main reasons for making OATH an autonomous, independent agency was to establish 'an independent structure outside of the agency to provide an unbiased assessment of the matters to be adjudicated.'" (quoting Report of the Charter Revision Committee, Vol. 2 at 103 (April 1989))).

An individualized assessment of penalty is appropriate. Having considered the factors consistently applied by this tribunal, penalties lower than those sought by the Department are warranted. In mitigation of the penalty are the respondents' unblemished disciplinary records. In addition, there is no evidence that the inmate suffered serious injury as a result of the captain's

retaliatory attack. Furthermore, respondents have not been found guilty of misconduct relating to their actions during the incident and appear to have acted appropriately under difficult circumstances. Indeed, as the inmate launched a violent, seemingly unprovoked attack on the captain, Officer Royster came to the captain's aid, subjecting herself to a vicious, sustained attack. Similarly, as the Department's attorney acknowledged, Officers Andrews and Mompremier acted appropriately in that they tried to stop a superior officer's use of force to retaliate against the inmate (Tr. 294). They did so because they knew her conduct was wrong, but failed to report that improper use of force as required.

Respondents' failure to include the captain's conduct in their reports undermines the purpose of the Department's use of force reporting requirements. The Department requires that its staff members submit complete and accurate reports as part of fulfilling its duty of care to inmates in its custody by ensuring that they are not subject to excessive and unwarranted use of force. Officers who fail to report force used by other staff members against an inmate jeopardize the Department's ability to fulfill that duty. Here, the officers might have been motivated by a desire to protect a captain who had just been brutally assaulted by the inmate she attacked. This is no justification for their failure to comply with the Department's reporting requirements.

Considering the officers' unblemished disciplinary records and tenures that ranged between approximately five and thirteen years, as well as the other mitigating factors, penalties short of those sought by the Department are appropriate. Accordingly, I recommend that Officers Royster, Andrews, and Mompremier each be suspended for 15 days without pay.

Astrid B. Gloade
Administrative Law Judge

June 26, 2020

SUBMITTED TO:

CYNTHIA BRANN
Commissioner

APPEARANCES:

ORBEIN DEARMAS, ESQ.
AMANDA OBERMAN, ESQ.
Attorneys for Petitioner

KOEHLER & ISAACS, LLP
Attorneys for Respondents
BY: ANDREW ROWE, ESQ.

-----X

In the Matter of :
Department of Correction, :
Petitioner :

-against- : OATH Index Nos. 156/20, 157/20, 460/20

C.O. Kim Royster, C.O. Joel Andrews, :
C.O. Joveny Mompremier :
Respondents :

-----X

ACTION OF THE COMMISSIONER

On May 8, 2018 Captain Deborah Prince encountered Inmate Terrel Richardson in an A.M.K.C. corridor leading to his housing area. At that time, Captain Prince gently touched Inmate Richardson on the shoulder as if to guide him through the corridor. Inmate Richardson responded by hurling a piece of paper he was holding, striking Captain Prince in the face.

A few moments later, Captain Prince proceeded to Inmate Richardson's housing area and ordered Inmate Richardson to be produced in the vestibule area. Captain Prince then engaged in a discussion with Inmate Richardson in the vestibule adjacent to the housing area and the A-Station. Also present during the ongoing discussion was A-Station Officer Kim Royster. The entire incident was captured by stationary Genetec cameras positioned in the area.

During the discussion, Inmate Richardson suddenly attacked Captain Prince, striking her several times and tossing her about the vestibule. Captain Prince suffered a serious laceration to her forehead during the struggle which bled profusely during the fight. Officer Royster tried to assist Captain Prince and was also struck and thrown to the ground by Inmate Richardson. C.O. Royster deployed chemical agents at Inmate Richardson in an attempt to gain control of the situation.

The fight lasted roughly one (1) minute, after which Inmate Richardson ceased his aggression and retreated into a small staff bathroom within the vestibule. Captain Prince then appeared to collect herself and summon assistance. She then tried, in vain, to open the staff bathroom where Inmate Richardson was hiding. She was unable to open the door because Inmate Richardson had apparently locked it from the inside.

Shortly thereafter, C.O. Joveny Mompremier, C.O. Joel Andrews and C.O. Johan Castro-Liz (Officer Castro-Liz is no longer employed with the Department) entered the area as part of a response team, under the supervision of Captain Juan Rosado. Officers Mompremier and Castro-Liz were wearing gas masks. As Officer Mompremier approached the staff bathroom, Inmate Richardson opened the bathroom door, put up his hands in surrender and began to

voluntarily lay prone on the ground to be handcuffed. However, as he was in the process of surrendering, Captain Prince charged towards him with a pen in her right hand which she had picked up from the ground following the fight. Inmate Richardson then retreated back into the bathroom. At that point, Officer Mompremier attempted to prevent Captain Prince from getting to Inmate Richardson. Captain Prince proceeded past Officer Mompremier and into the staff bathroom, attacking Inmate Richardson with the pen she had earlier picked up clenched in her right hand. Officer Royster walked towards the bathroom and positioned herself just outside the bathroom as Captain Prince initiated her attack on Inmate Richardson. Video footage showed Captain Prince making stabbing motions with the pen and make contact at least one time with Inmate Richardson's hand.

At the time of Captain Prince's attack, Officer Mompremier was inside the bathroom with Inmate Richardson and Captain Prince. Officer Andrews was just outside the bathroom and can be seen on the video footage trying to pull Captain Prince away from Inmate Richardson along with C.O. Castro-Liz as Captain Prince continued her attack against Inmate Richardson. Eventually, Officers Andrews and Castro-Liz were able to pull Captain Prince away from the staff bathroom. Inmate Richardson was then handcuffed and taken out of the area without further incident.

DOC Investigators Anika Flores and John Henderson of the Investigations Division interviewed Inmate Richardson the following day. During that interview, Inmate Richardson indicated that Captain Prince "tried to stab" him with a pen and showed the investigators three (3) small pen marks on his left hand.

Captain Prince was charged with violating the Department's Use of Force Directive for using excessive force against Inmate Richardson and for falsely reporting the incident in her Use of Force reports. The other Respondents in this case were charged with reporting violations in connection with the incident inside the staff bathroom. Captain Prince, Officer Mompremier, Officer Andrews and Officer Royster all submitted written reports wherein each failed to include the actions of Captain Prince when she attacked Inmate Richardson in the staff bathroom once the initial altercation was over and the response team had arrived in the area. Notably, the details leading up to and following that altercation were reported, including the handcuffing of Inmate Richardson and his removal from the area.

At a pretrial conference at the New York City Office of Administrative Trials and Hearings (OATH) on September 18, 2019, Captain Prince and all of the other respondents in this case rejected settlement offers. At that time, a disciplinary hearing was scheduled for December 9, 2019. However, on or about December 6, 2019, Captain Prince entered into a Negotiated Plea Agreement in settlement of this matter. In that agreement she accepted a penalty of sixty (60) days in compensatory time. The Department agreed in turn to dismiss Specification 1 of the amended charges and to modify the language of Specification 2 of the petition.

The Department was not able to reach an agreement with respect to Respondents Mompremier, Andrews or Royster. The Department originally offered all three Respondents a penalty of 30 compensatory days, consistent with the Nunez Disciplinary Guidelines. Counsel for Respondents countered our offer with a settlement proposal to return the cases for command discipline, which

we rejected. The Department conveyed to the Respondents that if Respondents lost at trial, the Department would seek a 30-day penalty from the presiding OATH judge.

Trial began as scheduled on December 9, 2019 and concluded on January 13, 2020. During the trial, the Department attempted to introduce the Department's Nunez Disciplinary Guidelines into evidence, but the presiding judge, Astrid Gloade, refused to accept them into evidence. Nonetheless, the Department referenced the Guidelines several times throughout the trial to remind the judge of its import in determining appropriate discipline.

On June 26, 2020, OATH issued its Report and Recommendation. In it, Judge Gloade found Officers Royster, Andrews and Mompremier guilty of submitting incomplete and inaccurate use of force reports. However, contrary to the Department's request at the conclusion of trial that a 30-day penalty be imposed on each guilty Respondent, Judge Gloade instead imposed a penalty of 15 suspension days. In doing so, she asserted that "the Department's Guidelines are not binding on OATH." It is the agency's position that ALJ Gloade erred in arriving at that conclusion.

On October 15, 2015, the United States District Court, Southern District of New York, signed a consent judgment (the "Nunez consent judgment") against the City of New York, resolving a lawsuit that alleged constitutional violations on the part of the City regarding the use of force by Department of Correction ("DOC") personnel. The judgment's purpose was to "protect the constitutional rights of the inmates confined in jails operated by DOC." Correction Officers' Benevolent Assn. v New York City Bd. of Collective Bargaining, 2019 N.Y. Misc. LEXIS 4865, *2 (Sup. Ct. N.Y. Co. 2019) (internal quotations and citations omitted). Amongst the issues the consent judgment sought to address was insufficient disciplinary penalties for certain acts of excessive force. Part of the remedy the Court required was for DOC to implement Disciplinary Guidelines to avoid inappropriate disciplinary penalties that were so insufficient that they failed to deter unconstitutional conduct. The Disciplinary Guidelines went into effect on October 27, 2017.

I have sought an opinion from the New York City Law Department regarding ALJ Gloade's conclusion that OATH's independence renders it free to disregard the Disciplinary Guidelines and, in turn, not address those Guidelines in formulating an appropriate penalty as required by the Nunez consent decree. As set forth in the Law Department's opinion (attached), as a matter of law, the Nunez consent judgment binds OATH to those Disciplinary Guidelines, since OATH is an agency of the City of New York and has been designated as the "deputy or other person" to hear disciplinary matters and report its findings to me.

While OATH retains its independence to perform its own analysis of the facts and render a determination regarding appropriate penalties, OATH must, in accordance with the consent judgement, adopt the Disciplinary Guidelines and explain any departure from those guidelines.

ALJ Gloade's conclusion that OATH is not bound by the Department's Disciplinary Guidelines runs afoul of the spirit of the Nunez consent judgment in that it fails to address the court's concern as articulated in its consent judgment, to protect the constitutional rights of inmates confined in DOC jails. The penalty recommendation by OATH in this case given the flagrant


omission to report a clear violation by respondents by each failing to report an obvious and unwarranted assault on an inmate who was in the process of submission to departmental authority, does little to deter or dissuade this type of misconduct.

I have carefully reviewed the findings and opinion of Judge Gloade in this case. I agree that the evidence supports the finding that Captain Prince used force against Inmate Terrel Richardson and that Officers Royster, Andrews and Mompremier engaged in clear misconduct when they failed to truthfully and accurately describe the facts and details of the force used. It is the position of this agency that such unequivocal misconduct in connection with a case wherein impermissible force was used against an inmate in DOC custody falls squarely within the parameters of the Nunez consent decree. Therefore, I maintain that the Disciplinary Guidelines are in fact applicable and binding on OATH in this matter.

I also reviewed the Fogel letter submitted by respondent's counsel, Mr. Andrew Rowe dated July 27, 2020 and reject entirely the justifications and defenses raised on behalf of respondents.

Accordingly, the decision of ALJ Astrid Gloade is **ADOPTED IN PART AND REVERSED IN PART**. The penalty decision is reversed, as well as the ALJ's statement that "Department's Guidelines are not binding on OATH, which is an independent tribunal that is not under the Department's control." Instead, I increase the penalty to 30 days suspension without pay for each petitioner, and I reiterate the legal conclusion of the Corporation Counsel, that OATH is required to take the Nunez consent judgment, including the Disciplinary Guidelines, into consideration when determining a penalty.

Date: 9/8/2020

Signature: 

Cynthia Brann
COMMISSIONER



THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, NY 10007

JAMES E. JOHNSON
Corporation Counsel

(212) 356-0800
jjohnso@law.nyc.gov

August 7, 2020

Via Electronic Mail

Hon. Cynthia Brann
Commissioner
NYC Department of Correction
75-20 Astoria Boulevard
East Elmhurst, NY 11370

Re: Applicability of Nunez Disciplinary Guidelines to OATH

Dear Commissioner Brann:

I was asked to render a legal opinion as to the applicability of the Nunez consent judgment (“Nunez”) disciplinary guidelines on the Office of Administrative Trials and Hearings (OATH). It is the opinion of the Corporation Counsel’s Office that the Nunez disciplinary guidelines are required by the consent judgment and applicable to OATH.

Background:

The Nunez consent judgment was entered against the entire City of New York, not just the DOC. See New York City Charter Section 396. OATH, while permitted to exercise independent judgment on a case-by-case basis as to findings of fact and recommended penalties is an agency of the City of New York and therefore is part of the “City of New York” as described in that judgment. See New York City Charter Section 1048. Thus, the provisions of the Nunez consent judgment do, in fact, apply to OATH although, as discussed in detail below, great care has been taken by the Court to preserve OATH’s independence.

The consent judgment requires the Commissioner to follow the Disciplinary Guidelines in imposing discipline, and only depart from them under extraordinary circumstances, which departure must be documented in writing and provided to the federal Nunez Monitor (Nunez consent judgment, Section VIII Staff Discipline and Accountability, provisions 2(c)(iii), 2(d)(iv), 2(e), and 5). In order to meet this obligation, the Commissioner must receive an explanation from the ALJ, as the “deputy or other person” designated to hear this matter pursuant to Civil Service Law Section 75(2), of any departures from the Disciplinary Guidelines mandated by the

Nunez consent judgment. The Commissioner cannot perform her legal obligations as the Commissioner without the benefit of discussion of the Disciplinary Guidelines in the Report and Recommendation.

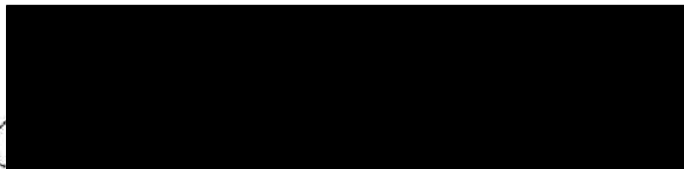
ALJ Gloade's Decision:

ALJ Gloade determined that the Petitioner established that each Respondent deliberately falsified their use of force report, violating DOC's Use of Force Directive, when they omitted from their report that a captain took retaliatory action against an inmate on May 8, 2018, but the penalty sought by DOC, a 30-day suspension for each officer, was excessive. ALJ Gloade instead issued a 15-day suspension for each officer. Under Nunez, DOC was required by the Nunez Disciplinary Guidelines to seek a 30-day suspension under the circumstances in this case. ALJ Gloade reached her determination without discussing her departure from the Nunez Disciplinary Guidelines.

In reaching her penalty determination, ALJ Gloade relied on OATH precedent that no longer applies to DOC cases following the Nunez consent judgment insofar as existing OATH precedent cannot overrule a judgment against the City by a United States District Court. Moreover, the cited OATH precedent ignores the legal question of the City's obligations under the Nunez consent judgment.

OATH judges are independent. They are not bound by either the factual or legal arguments made by the DOC attorneys who appear before them in a disciplinary matter. Indeed, the Nunez consent judgment was specifically crafted to preserve the ability of OATH to make independent determinations on a case-by-case basis given the applicable facts. Nevertheless, OATH ALJs cannot ignore Nunez including the provisions of the Nunez consent decree that require consideration of the Disciplinary Guidelines and an explanation for any departure. At a minimum, this means that if an ALJ wishes to depart from the Disciplinary Guidelines, the ALJ must provide an explanation of circumstances that justified that departure. Failure to do so undercuts the standards the United States District Court imposed upon the City: consistency and transparency.

Sincerely,

A large black rectangular redaction box covering the signature area.

James E. Johnson

**THE CITY OF NEW YORK
CIVIL SERVICE COMMISSION**

In the Matter of the Appeal of

KIM ROYSTER

Appellant

-against-

DEPARTMENT OF CORRECTION

Respondent

*Pursuant to Section 76 of the New York
State Civil Service Law*

CSC Index No: 2020-0643

DECISION

KIM ROYSTER (“Appellant”) appealed from a determination of the Department of Correction (“DOC”) finding Appellant, a Correction Officer, guilty of incompetency and/or misconduct and imposing a penalty of 30 days’ suspension following disciplinary proceedings conducted at the Office of Administrative Trials and Hearings (“OATH”) pursuant to Civil Service Law (“CSL”) Section 75.

In her June 26, 2020 Report and Recommendation, OATH Administrative Law Judge Astrid Gloade (“ALJ” or “ALJ Gloade”) found Appellant guilty of filing an incomplete use of force incident report in which she omitted a captain’s retaliatory use of force against an inmate and recommended a 15-day suspension. The ALJ rejected DOC’s arguments that a 30-day suspension was called for because it was the penalty established by DOC’s Disciplinary Guidelines for Use of Force Incidents (“Guidelines”). ALJ Gloade found the requested penalty to be excessive, given the nature of the misconduct, Appellant’s unblemished disciplinary record, and OATH’s prior precedent for similar misconduct. ALJ Gloade concluded that she was not

bound by the agency's Guidelines because OATH is an independent tribunal and not under DOC's control.

In her final decision, the DOC Commissioner rejected ALJ Gloade's penalty recommendation and imposed a 30-day suspension, explaining her reasoning as follows:

On October 15, 2015, the United States District Court, Southern District of New York, signed a consent judgment (the "Nunez consent judgment") against the City of New York, resolving a lawsuit that alleged constitutional violations on the part of the City regarding the use of force by [DOC] personnel. The judgment's purpose was to "protect the constitutional rights of the inmates confined in jails operated by DOC." *Correction Officers' Benevolent Assn. v New York City Bd. of Collective Bargaining*, 2019 N.Y. Misc. LEXIS 4865, (Sup. Ct. N.Y. Co. 2019) (internal quotations and citations omitted). Amongst the issues the consent judgment sought to address was insufficient disciplinary penalties for certain acts of excessive force. Part of the remedy the Court required was for DOC to implement Disciplinary Guidelines to avoid inappropriate disciplinary penalties that were so insufficient that they failed to deter unconstitutional conduct. The Disciplinary Guidelines went into effect on October 27, 2017.

I have sought an opinion from the New York City Law Department regarding ALJ Gloade's conclusion that OATH's independence renders it free to disregard the Disciplinary Guidelines and, in turn, not address those Guidelines in formulating an appropriate penalty as required by the Nunez consent decree. As set forth in the Law Department's opinion ... as a matter of law, the Nunez consent judgment binds OATH to those Disciplinary Guidelines, since OATH is an agency of the City of New York and has been designated as the "deputy or other person" to hear disciplinary matters and report its findings to me.

The DOC Commissioner found that ALJ Gloade's penalty recommendation in this case "given the flagrant omission to report a clear violation by [Appellant] failing to report an obvious and unwarranted assault on an inmate who was in the process of submission to departmental authority, does little to deter or dissuade this type of misconduct."

Appellant appealed to the Civil Service Commission (“Commission”) on September 16, 2020. On January 20, 2021, the Commission requested written arguments from the parties. Appellant relied on the letter that was submitted to the DOC Commissioner pursuant to *Fogel v. Board of Education*, 48 A.D.2d 925 (N.Y. App. Div. 1975). DOC submitted a brief on March 8, 2021.¹

The Commission has reviewed the record below, which we incorporate by reference into this decision, as well as arguments submitted on appeal, and find that there is sufficient evidence to support the final determination and that the penalty imposed is appropriate.

The Commission finds that both the Nunez consent judgment and the DOC Guidelines make clear that the minimum penalty for a false use of force report, as was found here, is 30 days’ suspension. The Guidelines give the DOC Commissioner discretion to depart from the minimum penalty where “extraordinary circumstances” exist and are articulated by the Commissioner. The absence of prior discipline does not constitute extraordinary circumstances because it was accounted for in the Guidelines setting 30 days as the minimum penalty for false reporting.

We note that while OATH ALJs are independent decision-makers under the City Charter, OATH’s authority to conduct a CSL Sec. 75 disciplinary proceeding is pursuant to a written delegation from the Commissioner. “In case a deputy or other person is so designated, he shall, for the purpose of such hearing, *be vested with all the powers of such officer or body* and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision (emphasis added).” CSL Sec. 75(2). Thus, the ALJ designated

¹ The Commission notes that its case processing timeframes for 2020 and 2021 have been impacted by Covid-19 related executive orders.

to preside in a disciplinary proceeding stands in the shoes of the Commissioner, with the same powers and constraints as the Commissioner. Both the Commissioner and the OATH ALJ are obligated to comply with the Guidelines that implement the Nunez consent judgment.

Therefore, the final decision and penalty imposed by the DOC Commissioner are hereby affirmed.

SO ORDERED.

Dated: July 9, 2021

**THE CITY OF NEW YORK
CIVIL SERVICE COMMISSION**

In the Matter of the Appeal of

JOEL ANDREWS

Appellant

-against-

DEPARTMENT OF CORRECTION

Respondent

*Pursuant to Section 76 of the New York
State Civil Service Law*

CSC Index No: 2020-0644

DECISION

JOEL ANDREWS (“Appellant”) appealed from a determination of the Department of Correction (“DOC”) finding Appellant, a Correction Officer, guilty of incompetency and/or misconduct and imposing a penalty of 30 days’ suspension following disciplinary proceedings conducted at the Office of Administrative Trials and Hearings (“OATH”) pursuant to Civil Service Law (“CSL”) Section 75.

In her June 26, 2020 Report and Recommendation, OATH Administrative Law Judge Astrid Gloade (“ALJ” or “ALJ Gloade”) found Appellant guilty of filing an incomplete use of force incident report in which he omitted a captain’s retaliatory use of force against an inmate and recommended a 15-day suspension. The ALJ rejected DOC’s arguments that a 30-day suspension was called for because it was the penalty established by DOC’s Disciplinary Guidelines for Use of Force Incidents (“Guidelines”). ALJ Gloade found the requested penalty to be excessive, given the nature of the misconduct, Appellant’s unblemished disciplinary record, and OATH’s prior precedent for similar misconduct. ALJ Gloade concluded that she was not

bound by the agency's Guidelines because OATH is an independent tribunal and not under DOC's control.

In her final decision, the DOC Commissioner rejected ALJ Gloade's penalty recommendation and imposed a 30-day suspension, explaining her reasoning as follows:

On October 15, 2015, the United States District Court, Southern District of New York, signed a consent judgment (the "Nunez consent judgment") against the City of New York, resolving a lawsuit that alleged constitutional violations on the part of the City regarding the use of force by [DOC] personnel. The judgment's purpose was to "protect the constitutional rights of the inmates confined in jails operated by DOC." *Correction Officers' Benevolent Assn. v New York City Bd. of Collective Bargaining*, 2019 N.Y. Misc. LEXIS 4865, (Sup. Ct. N.Y. Co. 2019) (internal quotations and citations omitted). Amongst the issues the consent judgment sought to address was insufficient disciplinary penalties for certain acts of excessive force. Part of the remedy the Court required was for DOC to implement Disciplinary Guidelines to avoid inappropriate disciplinary penalties that were so insufficient that they failed to deter unconstitutional conduct. The Disciplinary Guidelines went into effect on October 27, 2017.

I have sought an opinion from the New York City Law Department regarding ALJ Gloade's conclusion that OATH's independence renders it free to disregard the Disciplinary Guidelines and, in turn, not address those Guidelines in formulating an appropriate penalty as required by the Nunez consent decree. As set forth in the Law Department's opinion ... as a matter of law, the Nunez consent judgment binds OATH to those Disciplinary Guidelines, since OATH is an agency of the City of New York and has been designated as the "deputy or other person" to hear disciplinary matters and report its findings to me.

The DOC Commissioner found that ALJ Gloade's penalty recommendation in this case "given the flagrant omission to report a clear violation by [Appellant] failing to report an obvious and unwarranted assault on an inmate who was in the process of submission to departmental authority, does little to deter or dissuade this type of misconduct."

Appellant appealed to the Civil Service Commission (“Commission”) on September 16, 2020. On January 20, 2021, the Commission requested written arguments from the parties. Appellant relied on the letter that was submitted to the DOC Commissioner pursuant to *Fogel v. Board of Education*, 48 A.D.2d 925 (N.Y. App. Div. 1975). DOC submitted a brief on March 8, 2021.¹

The Commission has reviewed the record below, which we incorporate by reference into this decision, as well as arguments submitted on appeal, and find that there is sufficient evidence to support the final determination and that the penalty imposed is appropriate.

The Commission finds that both the Nunez consent judgment and the DOC Guidelines make clear that the minimum penalty for a false use of force report, as was found here, is 30 days’ suspension. The Guidelines give the DOC Commissioner discretion to depart from the minimum penalty where “extraordinary circumstances” exist and are articulated by the Commissioner. The absence of prior discipline does not constitute extraordinary circumstances because it was accounted for in the Guidelines setting 30 days as the minimum penalty for false reporting.

We note that while OATH ALJs are independent decision-makers under the City Charter, OATH’s authority to conduct a CSL Sec. 75 disciplinary proceeding is pursuant to a written delegation from the Commissioner. “In case a deputy or other person is so designated, he shall, for the purpose of such hearing, *be vested with all the powers of such officer or body* and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision (emphasis added).” CSL Sec. 75(2). Thus, the ALJ designated

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to preside in a disciplinary proceeding stands in the shoes of the Commissioner, with the same powers and constraints as the Commissioner. Both the Commissioner and the OATH ALJ are obligated to comply with the Guidelines that implement the Nunez consent judgment.

Therefore, the final decision and penalty imposed by the DOC Commissioner are hereby affirmed.

SO ORDERED.

Dated: July 9, 2021

**THE CITY OF NEW YORK
CIVIL SERVICE COMMISSION**

In the Matter of the Appeal of

JOVENY MOMPREMIER

Appellant

-against-

DEPARTMENT OF CORRECTION

Respondent

*Pursuant to Section 76 of the New York
State Civil Service Law*

CSC Index No: 2020-0645

DECISION

JOVENY MOMPREMIER (“Appellant”) appealed from a determination of the Department of Correction (“DOC”) finding Appellant, a Correction Officer, guilty of incompetency and/or misconduct and imposing a penalty of 30 days’ suspension following disciplinary proceedings conducted at the Office of Administrative Trials and Hearings (“OATH”) pursuant to Civil Service Law (“CSL”) Section 75.

In her June 26, 2020 Report and Recommendation, OATH Administrative Law Judge Astrid Gloade (“ALJ” or “ALJ Gloade”) found Appellant guilty of filing an incomplete use of force incident report in which he omitted a captain’s retaliatory use of force against an inmate and recommended a 15-day suspension. The ALJ rejected DOC’s arguments that a 30-day suspension was called for because it was the penalty established by DOC’s Disciplinary Guidelines for Use of Force Incidents (“Guidelines”). ALJ Gloade found the requested penalty to be excessive, given the nature of the misconduct, Appellant’s unblemished disciplinary record, and OATH’s prior precedent for similar misconduct. ALJ Gloade concluded that she was not

bound by the agency's Guidelines because OATH is an independent tribunal and not under DOC's control.

In her final decision, the DOC Commissioner rejected ALJ Gloade's penalty recommendation and imposed a 30-day suspension, explaining her reasoning as follows:

On October 15, 2015, the United States District Court, Southern District of New York, signed a consent judgment (the "Nunez consent judgment") against the City of New York, resolving a lawsuit that alleged constitutional violations on the part of the City regarding the use of force by [DOC] personnel. The judgment's purpose was to "protect the constitutional rights of the inmates confined in jails operated by DOC." *Correction Officers' Benevolent Assn. v New York City Bd. of Collective Bargaining*, 2019 N.Y. Misc. LEXIS 4865, (Sup. Ct. N.Y. Co. 2019) (internal quotations and citations omitted). Amongst the issues the consent judgment sought to address was insufficient disciplinary penalties for certain acts of excessive force. Part of the remedy the Court required was for DOC to implement Disciplinary Guidelines to avoid inappropriate disciplinary penalties that were so insufficient that they failed to deter unconstitutional conduct. The Disciplinary Guidelines went into effect on October 27, 2017.

I have sought an opinion from the New York City Law Department regarding ALJ Gloade's conclusion that OATH's independence renders it free to disregard the Disciplinary Guidelines and, in turn, not address those Guidelines in formulating an appropriate penalty as required by the Nunez consent decree. As set forth in the Law Department's opinion ... as a matter of law, the Nunez consent judgment binds OATH to those Disciplinary Guidelines, since OATH is an agency of the City of New York and has been designated as the "deputy or other person" to hear disciplinary matters and report its findings to me.

The DOC Commissioner found that ALJ Gloade's penalty recommendation in this case "given the flagrant omission to report a clear violation by [Appellant] failing to report an obvious and unwarranted assault on an inmate who was in the process of submission to departmental authority, does little to deter or dissuade this type of misconduct."

Appellant appealed to the Civil Service Commission (“Commission”) on September 16, 2020. On January 20, 2021, the Commission requested written arguments from the parties. Appellant relied on the letter that was submitted to the DOC Commissioner pursuant to *Fogel v. Board of Education*, 48 A.D.2d 925 (N.Y. App. Div. 1975). DOC submitted a brief on March 8, 2021.¹

The Commission has reviewed the record below, which we incorporate by reference into this decision, as well as arguments submitted on appeal, and find that there is sufficient evidence to support the final determination and that the penalty imposed is appropriate.

The Commission finds that both the Nunez consent judgment and the DOC Guidelines make clear that the minimum penalty for a false use of force report, as was found here, is 30 days’ suspension. The Guidelines give the DOC Commissioner discretion to depart from the minimum penalty where “extraordinary circumstances” exist and are articulated by the Commissioner. The absence of prior discipline does not constitute extraordinary circumstances because it was accounted for in the Guidelines setting 30 days as the minimum penalty for false reporting.

We note that while OATH ALJs are independent decision-makers under the City Charter, OATH’s authority to conduct a CSL Sec. 75 disciplinary proceeding is pursuant to a written delegation from the Commissioner. “In case a deputy or other person is so designated, he shall, for the purpose of such hearing, *be vested with all the powers of such officer or body* and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision (emphasis added).” CSL Sec. 75(2). Thus, the ALJ designated

¹ The Commission notes that its case processing timeframes for 2020 and 2021 have been impacted by Covid-19 related executive orders.

to preside in a disciplinary proceeding stands in the shoes of the Commissioner, with the same powers and constraints as the Commissioner. Both the Commissioner and the OATH ALJ are obligated to comply with the Guidelines that implement the Nunez consent judgment.

Therefore, the final decision and penalty imposed by the DOC Commissioner are hereby affirmed.

SO ORDERED.

Dated: July 9, 2021